

**BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001**

**COMPLAINT OF GAMEFLY, INC.**

**Docket No. C2009-1**

**NETFLIX, INC'S MOTION FOR ACCESS TO THE NON-REDACTED ANSWER  
OF GAMEFLY INC'S OPPOSITION OF THE UNITED STATES POSTAL  
SERVICE TO MOTION TO COMPEL**

Pursuant to the Postal Regulatory Commission's Rules of Practice and more recent Order No. 225 Netflix, Inc hereby respectfully requests access to certain non-public materials that have been filed under seal by GameFly, Inc with the Commission.

Notwithstanding the fact that Netflix is not a party to this proceeding, Timothy J. May, Outside Counsel to Netflix, Inc and David Hyman, Netflix Inc's General Counsel, have both executed a Statement of Compliance with Protective Conditions in accordance with the Commission Rulings (modified as appropriate to apply to this Motion) which are attached to this Motion.

Netflix Inc's interest in this proceeding stems from GameFly's assertion in its initial Complaint that the United States Postal Service offers preferential treatment to other mailers (including Netflix) and thus unlawfully discriminates against GameFly. Accordingly, because Netflix is concerned about its proprietary information, it seeks access to any redacted information that may impact its business.

Respectfully submitted,

Timothy J. May  
Patton Boggs LLP  
2550 M Street, N.W.  
Washington, DC 20037  
[tmay@pattonboggs.com](mailto:tmay@pattonboggs.com)

Counsel for Netflix, Inc.

David Hyman  
General Counsel, Netflix  
100 Winchester Circle  
Los Gatos, CA 95032

Dated this 9<sup>th</sup> day of September, 2009

## **PROTECTIVE CONDITIONS IN DOCKET NO. C2009-1**

The following protective conditions limit access to materials produced in Docket No. C2009-1 and designated as protected material by the participant producing the materials. Individuals seeking to obtain access to these materials must agree to comply with these conditions, complete the attached certifications, provide the completed certifications to the Commission, and serve them upon counsel for the party submitting the confidential material.

1. Only a person who is either:
  - (a) an employee of the Postal Regulatory Commission (including the Public Representative in this docket) with a need-to-know; or
  - (b) a participant in Postal Regulatory Commission Docket No. C2009-1, or a person employed by such participant, or acting as agent, consultant, contractor, affiliated person, or other representative of such participant for purposes related to the litigation of Docket No. C2009-1, shall be granted access to these materials. However, no person involved in competitive decision-making for any entity that might gain competitive advantage from use of this information shall be granted access to these materials. "Involved in competitive decision-making" includes consulting on marketing or advertising strategies, pricing, product research and development, product design, or the competitive structuring and composition of bids, offers or proposals. It does not include rendering legal advice or performing other services that are not directly in furtherance of activities in competition with a person or entity having a proprietary interest in the protected material.
2. No person granted access to these materials is permitted to disseminate them in whole or in part to any person not authorized to obtain access under these conditions. A person granted access to these materials may use them only for purposes of analyzing matters at issue in Docket No. C2009-1.
3. The final date of any participant's access shall be the earlier of:
  - (a) 31 days following the date on which the Postal Regulatory Commission issues its final order or otherwise closes Docket No. C2009-1, except that a party who participates in judicial review of the order shall continue to have access until the termination of judicial review;
  - (b) the date on which that participant formally withdraws from Docket No. C2009-1; or

- (c) the last date on which the person who obtains access is under contract or retained or otherwise affiliated with the Docket No. C2009-1 participant on whose behalf that person obtains access, whichever comes first. The participant immediately shall notify the Postal Regulatory Commission and counsel for the party who provided the protected material of the termination of any such business and consulting arrangement or retainer or affiliation that occurs before the closing of the evidentiary record.
- 4. Immediately after the termination date specified in paragraph 3, each participant (and any person working on behalf of that participant) who has obtained a copy of these materials shall:
  - (a) certify to the Commission that the copy was maintained in accordance with these conditions (or others established by the Commission); and
  - (b) certify that the copy (and any duplicates) either have been destroyed or returned to the Commission.
- 5. The duties of any persons obtaining access to these materials shall apply to material disclosed or duplicated in writing, orally, electronically, or otherwise, by any means, format, or medium. These duties shall apply to the disclosure of excerpts from or parts of the document, as well as to the entire document.
- 6. All persons who obtain access to these materials are required to protect the document by using the same degree of care, but no less than a reasonable degree of care, to prevent the unauthorized disclosure of the document as those persons, in the ordinary course of business, would be expected to use to protect their own proprietary material or trade secrets and other internal, confidential, commercially-sensitive, and privileged information.
- 7. These conditions shall apply to any revised, amended, or supplemental versions of materials provided in Docket No. C2009-1.
- 8. The duty of nondisclosure of anyone obtaining access to these materials is continuing, terminable only by specific order of the Commission, or as specified in paragraphs 10 through 15, below.
- 9. Any Docket No. C2009-1 participant or other person seeking access to these materials by requesting access, consents to these or such other conditions as the Commission may approve.
- 10. The party submitting the confidential material shall clearly mark the following legend on each page, or portion thereof, that it seeks to protect under this agreement: "Confidential—Subject To Protective Conditions In

Docket No. C2009-1 Before the Postal Regulatory Commission” or other markings that are reasonably calculated to alert custodians of the material to its confidential or proprietary nature.

11. Any written materials — including but not limited to discovery requests and Responses, requests for admission and responses, deposition transcripts and exhibits, pleadings, motions, affidavits, written testimony and briefs — that quote, summarize, or contain materials protected under these protective conditions are also covered by the same protective conditions and certification requirements, and shall be filed with the Commission only under seal. Documents submitted to the Commission as confidential shall remain sealed while in the Secretary’s office or such other place as the Commission may designate so long as they retain their status as confidential documents.
12. Any oral testimony, argument or other statements that quote, summarize or otherwise disclose materials protected under these protective conditions shall be received only in hearing sessions limited to persons who have complied with the terms of the protective order and have signed the attached certifications. The transcript pages containing such protected testimony shall be filed under seal and treated as protected materials under paragraph 11.
13. Notwithstanding the foregoing, protected material covered by paragraphs 11 or 12 may be disclosed to the following persons without their execution of a compliance certificate. Such disclosure shall not exceed the extent necessary to assist in prosecuting this proceeding or any appeals or reconsideration thereof.
  - (a) Members of the Commission.
  - (b) Court reporters, stenographers, or persons operating audio or video recording equipment for such court reporters or stenographers at hearings or depositions.
    - (c) Any other person designated by the Commission in the interest of justice, upon such terms as the Commission may deem proper.
    - (d) Reviewing courts and their staffs. Any person seeking to disclose protected information to a reviewing court shall make a good faith effort to obtain protective conditions at least as effective as those set forth in this document. Moreover, the protective conditions set forth herein shall remain in effect throughout any subsequent review unless overridden by the action of a reviewing court.
14. A participant may apply to the Commission for a ruling that documents,

categories of documents, or deposition transcripts, stamped or designated as confidential, are not entitled to such status and protection. The party that designated the document or testimony as confidential shall be given notice of the application and an opportunity to respond. If the protected information was obtained by the producing party from a third party, the producing party shall notify the third party within two business days of the request for revocation of the confidential status of the information, and the third party shall have an opportunity to contest the request. To revoke confidential status, the proponent of declassification must show by a preponderance of the evidence that public disclosure of the materials is consistent with the standards of the Freedom of Information Act, 5 U.S.C. § 552(b)(1)-(9), and Commission precedent.

15. Subpoena by Courts or Other Agencies. If a court or other administrative agency subpoenas or orders production of confidential information which a participant has obtained under the terms of this protective order, the target of the subpoena or order shall promptly (within two business days) notify the party who designated the document as confidential of the pendency of the subpoena or order to allow the designating party time to object to that production or seek a protective order. If the protected information was obtained by the target of the subpoena or order from a third party, the target party shall notify the third party within two business days of the subpoena or order.

## CERTIFICATION

The undersigned represents that:

Access to material provided in Docket No. C2009-1 by GameFly, Inc. and designated as protected material has been authorized by the Commission. The cover or label of any such material obtained by me is marked with my name. I agree to use the information only for purposes of analyzing matters at issue in Docket No. C2009-1. I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain these materials in strict confidence in accordance with all of the protective conditions set out above.

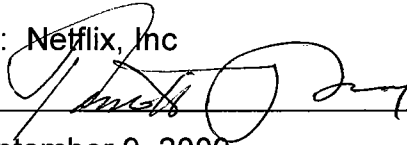
Name : Timothy J. May

Firm: Patton Boggs LLP

Title: Partner

Representing: Netflix, Inc

Signature

A handwritten signature in black ink, appearing to read "Timothy J. May", is written over a horizontal line.

Date: September 9, 2009

## CERTIFICATION

The undersigned represents that:

Access to material provided in Docket No. C2009-1 by GameFly, Inc. and designated as protected material has been authorized by the Commission. The cover or label of any such material obtained by me is marked with my name. I agree to use the information only for purposes of analyzing matters at issue in Docket No. C2009-1. I certify that I have read and understand the above protective conditions and am eligible to receive access to materials under paragraph 1 of the protective conditions. I further agree to comply with all protective conditions and will maintain these materials in strict confidence in accordance with all of the protective conditions set out above.

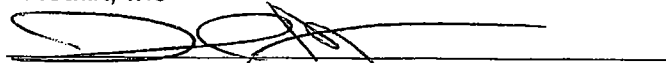
Name : David Hyman

Firm: Netflix, Inc

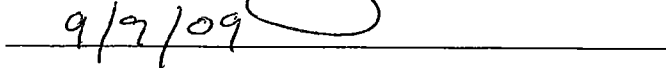
Title: General Counsel – Netflix, Inc

Representing: Netflix, Inc

Signature

A handwritten signature in black ink, appearing to be "D. Hyman", written over a horizontal line.

Date:

A handwritten date "9/7/09" in black ink, written over a horizontal line.